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## APPENDIX TO APPELLANTS' BRIEF

# United States Court of Appeals

### For the Second Circuit

**Docket No. 24685**

In the Matter of

The Issuance of a Subpoena to ALFRED K. STERN and MARTHA DODD STERN, citizens of the United States presently residing in Mexico,

Appellants,

*against*

UNITED STATES OF AMERICA,

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## Statement of Relevant Docket Entries

| Date | Proceedings |
|---|---|
| 2/22/57 | Filed order for the issuance of subpoena for Martha Dodd Stern, McGohey, J. |
| 2/22/57 | Filed order for the issuance of subpoena for Alfred K. Stern, McGohey, J. |
| 3/7/57 | Filed Affdvt. and notice of motion to quash subpoenas, Re: Alfred K. Stern and Martha Dodd Stern. Retb. 3/11/57. |
| 3/8/57 | Filed copy of order for subpoena. Re: Martha Dodd Stern. Subp. Att. & Post Card Att. |

*Statement of Relevant Docket Entries*

| Date | Proceedings |
|---|---|
| 3/ 8/57 | Filed copy order for subpoena. Re: Alfred K. Stern Subp. Att. and Post Card Att. |
| 3/11/57 | Motions by Alfred K. Stern and Martha Dodd Stern to quash subpoenas argued. Dec. Res. Murphy, J. |
| 3/12/57 | Memo endorsed on notice of motion filed 3/7/57. Re: Alfred K and Martha Dodd Stern. Motion denied. Only point raised in discussion has already been adjudicated in this court, etc. No settlement necessary. Murphy, J. |
| 3/14/57 | Filed Affdvt. and order to show cause for contempt. Re: Subpoena for Martha Dodd Stern. Retb. 3/26/57. |
| 3/14/57 | Filed Affdvt. and order to show cause for contempt. Re: Alfred K. Stern's subpoena. Retb. 3/26/57. |
| 3/22/57 | Filed notice appeal. Re: Alfred and Martha Stern and mailed copy to U. S. Attorney on 3/25/57. |
| 3/22/57 | Filed notice with an appeal will be taken. Re: Alfred and Martha Dodd Stern. |
| 3/22/57 | Filed order for the issuance of subpoena. Re: Alfred K. Stern, McGohey, J. |
| 3/22/57 | Filed order for the issuance of subpoena. Re: Martha Dodd Stern. |
| 4/23/57 | Filed copy of order. Re: Alfred K. Stern. Filed 3/22/57 and Affdvt. of U. S. Consul, Mexico as to service on Alfred K. Stern, 4/1/57. |
| 4/23/57 | Filed copy of order. Re: Martha Dodd Stern. |

*Statement of Relevant Docket Entries*

| Date | Proceedings |
|---|---|
| 4/23/57 | Filed copy of order. Re: Alfred K. Stern. |
| 4/25/57 | Before Levet, J., hearing on show cause to punish Alfred K. and Martha Dodd Stern for contempt—concluded. Decision reserved. Adjourned to 5/1/57 at 2:00 p. m. |
| 4/25/57 | Filed special appearance by Paul O'Dwyer, 40 Wall Street as Atty. for Alfred and Martha Dodd Stern. |
| 5/ 1/57 | Before Levet, J., application to punish Martha Dodd Stern for contempt—granted, Martha Dodd Stern fined $25,000.00. Application to punish Alfred K. Stern for contempt of court—granted—fined $25,000.00. Settled orders on notice. |
| 5/ 1/57 | Filed Affdvt. and notice of motion to vacate order of Murphy, J., Re: Alfred K. and Martha Dodd Stern with memorandum endorsed reverse side. Motion denied. So ordered, Levet, J. |
| 5/ 6/57 | Filed order that Martha Dodd Stern be held in contempt of court and fined in sum of $25,000.00, etc. Levet, J. |
| 5/ 7/57 | Filed order that Alfred K. Stern be held in contempt of court and fined in sum of $25,000.00, etc. Levet, J. |
| 5/10/57 | Filed notice of appeal. |

## Order for the Issuance of Subpoena

(Record, page 93)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter

of the issuance of a subpoena upon
MARTHA DODD STERN

a citizen of the United States of America,
presently residing in Mexico.

Upon the affidavit of John T. Moran, Jr., Assistant United States Attorney for the Southern District of New York, sworn to the 21st day of February, 1957, it is

ORDERED that a subpoena issue herein commanding Martha Dodd Stern to appear on March 14, 1957, before the January Special Grand Jury for the Southern District of New York, and it is

FURTHER ORDERED that any Consul General or Consul of the United States of America within the Republic of Mexico be and he hereby is directed to serve said subpoena upon said Martha Dodd Stern, and it is

FURTHER ORDERED that the said Consul General or Consul serving said subpoena tender said Martha Dodd Stern $468.00, the amount necessary for her expenses in going from and returning to her place of residence, Mexico City, Mexico and for her attendance at the place at which this Court sits.

JOHN F. X. MCGOHEY,
*U. S. D. J.*

February 21, 1957.

A True Copy

HERBERT A. CHARLSON, Clerk,
By EUGENE LIEBER,
Deputy Clerk.
(Seal)

## Affidavit of John T. Moran, Jr., in Support of Order for the Issuance of Subpoena

(Record, pages 94-96)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

---

[SAME TITLE]

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STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:
SOUTHERN DISTRICT OF NEW YORK }

JOHN T. MORAN, JR., being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Southern District of New York, and as such am fully familiar with the facts in the above-entitled matter.

2. The Attorney General desires the testimony of Alfred K. Stern and Martha Dodd Stern each of whom is a citizen of the United States of America in a criminal proceeding before the January Special Grand Jury for the Southern District of New York on March 14, 1957.

3. Upon information and belief, Alfred K. Stern and Martha Dodd Stern are beyond the jurisdiction of the United States of America, residing in Mexico City, Mexico.

4. Deponent respectfully submits that Title 28, Section 1783, United States Code, authorizes the foreign service sought here.

*Affidavit of John T. Moran, Jr., in Support of Order for the Issuance of Subpoena*

3. Your deponent further states that the travel and attendance expenses were computed in the following manner:

| | |
|---|---|
| Attendance expenses for 14 days at the rate of $8.00 per day ..... | $112.00 |
| Witness fee for 10 days travel time and 4 days appearances at the rate of $4.00 per day ..... | 56.00 |
| Travel allowance between Mexico City, Mexico and New York City and return (2808 miles at 8¢ a mile) ..... | 449.28 |
| Estimated expense of travel to and from transportation termini ..... | 10.00 |
| | $627.28 |

4. Your deponent respectfully submits that Title 28, section 1821, United States Code, authorized in lieu of the mileage allowance, the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage incurred by a witness required to travel to and from the continental United States; that your deponent has been informed by experienced travel counsel for American Express Company that the actual expense of travel by train or by air at first-class rates between Mexico City, Mexico and New York City and return does not exceed $300.00.

5. Total travel and attendance expenses tendered to each witness at the time of service of the subpoena will therefore amount to $468.00.

WHEREFORE deponent prays that subpoenas issue and be sent to any Consul General or Consul of the United States of America within the Republic of Mexico and that

such Consul General or Consul be authorized to serve said subpoenas commanding Alfred K. Stern and Martha Dodd Stern to appear before the January Special Grand Jury for the Southern District of New York on the 14th day of March, 1957, at 10:30 in the forenoon, at the United States Court House, Foley Square, New York City, Room 1401, and that the Court fix the sum of $468.00 as the necessary travel and attendance expenses to be sent with the subpoena and tendered to each such witness at the time of the service of said subpoena.

JOHN T. MORAN, JR.

(Sworn to February 21, 1957.)

* * *

[An identical order, upon an identical affidavit, same dates, with respect to Alfred K. Stern.]

* * *

## Subpoena

(Record, page 117)

JTM:GR

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To: MARTHA DODD STERN
Calle Oliver Goldsmith 38
Pelanco, Mexico, D. F.

GREETING:

WE COMMAND YOU that all and singular business and excuses being laid aside, you and each of you appear and attend before the Grand Inquest of the body of the people

*Subpoena*

of the United States of America for the Southern District of New York, at a District Court, to be held at Room 513 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, in and for the said Southern District of New York, on the 14th day of March 1957, at 10:30 o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of Section 371, Title 18, U. S. Code on the part of the United States, and not to depart the Court without leave thereof, or of the District Attorney.

And this you, or any of you are not to omit, under the penalty upon you and every of you, of Two Hundred and Fifty Dollars.

WITNESS the Honorable John W. Clancy, Judge of the United States District Court at the Borough of Manhattan, in the City of New York, the 21st day of February, in the year of our Lord, One Thousand Nine Hundred and Fifty-seven.

HERBERT A. CHARLSON,
Clerk.

PAUL W. WILLIAMS,
United States Attorney.

Mr. Moran—Rm. 307C

* * *

[An identical subpoena issued on same date, directed to Alfred K. Stern.]

## Notice of Motion to Quash Subpoenas and Memo Endorsed Denying Motion

(Record, pages 101-102)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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[SAME TITLE BUT NAMING BOTH APPELLANTS]

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Sir:

PLEASE TAKE NOTICE that upon the annexed affidavit of Paul O'Dwyer, duly sworn to the 6th day of March, 1957, and upon the orders made by Hon. John F. X. McGohey District Judge, herein dated February 21, 1957 and the papers on which said orders were made, and the subpoenas issued pursuant to said orders, the undersigned will move this Court at a Term for the hearing of motions to be held at the United States Court House, Room 318, Foley Square, New York, New York on the 11th day of March, 1957 at 10:30 a. m. of that day or as soon thereafter as counsel can be heard for an order (1) vacating and setting aside said orders of February 21, 1957 and quashing the subpoenas issued thereunder on the ground that said orders and subpoenas were not authorized by law, are illegal, null and void; and (2) pending the determination of this application, extending the return date provided for in said subpoenas until a date ten days after final decision herein.

Dated: March 6, 1957.

PAUL O'DWYER,
Attorney for Alfred K. Stern and
Martha Dodd Stern,
Appearing specially for the purposes of this motion only,
40 Wall Street,
New York 5, New York.

*Order to Show Cause and Affidavit*

To:

PAUL WILLIAMS, ESQ.,
United States Attorney.

• • •

(Record, page 108A)

[Memo endorsed:]

"Motion denied. The only point raised that merits any discussion has already been adjudicated in this Court. Cf. U. S. v. Leff, S. D. N. Y. C-143-309 (1954).

This is an order. No settlement is necessary.

/s/ THOS. F. MURPHY,
U. S. D. J."

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## Order to Show Cause and Affidavit

(Record, pages 139-140)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

---

[SAME TITLE]

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Upon the annexed affidavit of John T. Moran, Jr., Assistant United States Attorney for the Southern District of New York, sworn to the 21st day of March, 1957, and upon all the proceedings heretofore had herein, it is

ORDERED that the Order issued March 14, 1957 by the Honorable Thomas F. Murphy, United States District Judge for the Southern District of New York, upon the

application of William S. Kenney, Special Attorney for the Department of Justice, directing Martha Dodd Stern to show cause before a term of this Court to be held on March 26, 1957, why she should not be punished for contempt for her failure to obey a subpoena of this Court, be, and hereby is amended in the following respects:

1. ORDERED that Martha Dodd Stern, residing in Mexico City, Mexico, show cause before a term of this Court, to be held in Room 318, United States Court House, Foley Square, New York, New York, in the forenoon of April 15, 1957, at the opening of Court on that day, or as soon thereafter as counsel can be heard, why she should not be punished for contempt for her failure to obey a subpoena of this Court, and it is

2. FURTHER ORDERED that the service of a true copy of this Order at least seven days prior to April 15, 1957 by any Consul General or Consul of the United States within the Republic of Mexico or within any country in which the said Martha Dodd Stern may be found, shall be sufficient service.

Dated: New York, N. Y., March 21, 1957.

THOS. F. MURPHY,
U. S. D. J.

A true copy

HERBERT A. CHARLSON, Clerk,
By CATHERINE B. SOLOMONE,
Deputy Clerk.

MAK

## Affidavit of John T. Moran, Jr., in Support of Order to Show Cause

(Record, pages 141-142)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

---

[SAME TITLE]

---

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

JOHN T. MORAN, JR., being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Southern District of New York and as such am familiar with the facts in the above entitled matter.

2. On March 14, 1957 the Honorable Thomas F. Murphy, United States District Judge for the Southern District of New York, upon the affidavit of William S. Kenney, Special Attorney for the Department of Justice, ordered Martha Dodd Stern, residing in Mexico City, Mexico, to show cause before a term of this Court, to be held in Room 318, United States Court House, Foley Square, New York, New York, in the forenoon of March 26, 1957, at the opening of Court on that day, or as soon thereafter as counsel can be heard, why she should not be punished for contempt for her failure to obey a subpoena of this Court. It was further ordered that the service of a true copy of this order to show cause at least seven days prior to March 26, 1957, by any Consul General or Consul of the United

*Affidavit of John T. Moran, Jr., in Support of Order to Show Cause*

States, within the Republic of Mexico, or within any country in which the said Martha Dodd Stern may be found, should be sufficient service.

3. The American Consul at Mexico City, Mexico has informed your deponent that he was unable to make service of a copy of the Order to Show Cause dated March 14, 1957, within the time prescribed by said Order.

4. Wherefore, your deponent prays that the Order to Show Cause dated March 14, 1957 be amended in the following respects:

a) That Martha Dodd Stern, residing in Mexico City, Mexico, show cause before a term of this Court, to be held in Room 318, United States Court House, Foley Square, New York, New York, in the forenoon of April 15, 1957, at the opening of Court on that day, or as soon thereafter as counsel can be heard, why she should not be punished for contempt for her failure to obey a subpoena of this Court.

b) That the service of a true copy of this Order at least seven days prior to April 15, 1957, by any Consul General or Consul of the United States within the Republic of Mexico or within any country in which the said Martha Dodd Stern may be found, shall be sufficient service.

5. No previous application for the relief sought herein has been made to the Court.

JOHN T. MORAN, JR.

(Sworn to March 21, 1957.)

## Notice of Motion to Vacate Unserved Order and Memo Endorsed

(Record, pages 155-156)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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[SAME TITLE BUT WITH RESPECT TO *BOTH APPELLANTS*]

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Sir:

PLEASE TAKE NOTICE that Alfred K. Stern and Martha Dodd Stern respectively named in the above proceedings appearing specially for the purpose hereinafter set forth will move this Court at a Term thereof to be held in Room 318 United States Court House, Foley Square, New York, New York on May 1, 1957 at 2:00 o'clock on that day or as soon thereafter as counsel can be heard for an order vacating and setting aside the order purportedly made herein by Hon. Thomas F. Murphy District Judge on March 14, 1957 and more particularly vacating, annulling and setting aside the order or provision therein to the effect that any United States Marshal or Deputy Marshal shall levy or seize any of their property within the United States; and annulling or expunging or eliminating from this proceeding the aforementioned order bearing date March 14, 1957 and the affidavit of William S. Kenney annexed to said order sworn to March 14, 1957 upon the grounds that (1) said alleged order and affidavit are not claimed to have been served, and were not served upon them as required by the statutes in such cases made and provided; (2) this Court is without jurisdiction with respect to their persons and/or property; and (3) on all

*Notice of Motion to Vacate Unsigned Order and Memo Endorsed*

grounds heretofore stated in their special appearance heretofore filed herein.

Dated: New York, New York,
April 25, 1957

ALFRED K. STERN and
MARTHA DODD STERN,
By /s/ PAUL O'DWYER,
their attorney appearing specially for the purposes above stated.

To:

PAUL W. WILLIAMS,
United States Attorney,
United States Court House,
Foley Square,
New York 7, New York.

• • •

(Record, page 158)

[Memo endorsed:]

"Motion denied.

So ordered.

May 1, 1957.

RICHARD M. LEVET,
U. S. D. J."

## Opinion

[Proceedings]

Before:

Hon. Richard H. Levet, District Judge.

New York, May 1, 1957

Appearances:

Joseph T. Eddins, Esq., Trial Attorney, Department of Justice, and Paul W. Williams, Esq., United States Attorney, for the Government; by Thomas B. Gilchrist, Jr., Esq., Assistant United States Attorney.

Paul O'Dwyer, Esq., Appearing specially for Witnesses; Paul O'Dwyer, Esq., and Howard N. Meyer, Esq., of Counsel.

• • •

[53] The Court: Very well.

I think I indicated last week when this was heard a tentative determination which I expected to make.

These are companion motions to hold respondents Alfred K. Stern and his wife, Martha Dodd Stern, in contempt by reason of their failure to obey a subpoena to appear and testify before a Grand Jury. The facts are the same in each case.

Both respondents are citizens of the United States but now and for some time have resided in Mexico.

On February 21, 1957, Judge John F. X. McGohey of this Court, upon the affidavit of John T. Moran, Jr., Assistant United States Attorney for the Southern District of New York, which affidavit was sworn to February 21, 1957, ordered that a subpoena issue commanding the said Alfred K. Stern to appear before the January Special Grand

Jury for the Southern District of New York, and, further, that any Consul General or Consul of the United States of America within the Republic of Mexico serve the said subpoena.

Judge McGohey's order also provided the amount to be tendered with the said subpoena for the expenses of Alfred K. Stern in going from and returning to Mexico [54] City and for attendance at the place at which the Court sits.

Mr. Moran's affidavit sets forth the following facts: That the Attorney General desires the testimony of Alfred K. Stern; that Stern and his wife are citizens of the United States; that they were residing in Mexico City, Mexico, and so forth.

A similar order was made with respect to Martha Dodd Stern.

A subpoena was thereafter duly issued and on February 27, 1957, W. John Wilson, Jr., American Consul in Mexico City, served a copy upon Alfred K. Stern, together with the sum of $468, which he accepted.

A similar subpoena was issued and served upon Martha Dodd Stern at the same place, on the same date.

These subpoenas required Alfred K. Stern and Martha Dodd Stern, respectively, to "appear * * * before the Grand Inquest of the body of the People of the United States of America for the Southern District of New York, at a District Court, to be held at Room 1401 in the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, in and for the said Southern District of New York, on the 14th day [55] of March, 1957, at 10:30 o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of Section 371, Title 18, U. S. Code on the part of the United States, and not to depart the Court without leave thereof, or of the District Attorney."

*Opinion*

On March 14, 1957, the return date of the subpoenas, neither Alfred K. Stern nor Martha Dodd Stern appeared before the Grand Jury. William S. Kenney, Special Attorney of the Department of Justice assigned to this case, so testified before me on April 25, 1957.

On March 6, 1957, by notice of motion returnable before Judge Thomas F. Murphy on March 11, 1957, counsel appearing specially for Alfred K. Stern and Martha Dodd Stern moved to set aside and quash the service of the subpoenas.

After hearings, Judge Murphy denied the motions on March 12, 1957 upon the authority of Judge Noonan's decision of May 28, 1954 in United States of America versus David Neal Leff, Civil Docket No. 143-309.

An appeal was noticed from this determination and a Writ of Prohibition and/or a Writ of Mandamus was sought, but no stay or other relief pending appeal from any final order was granted.

[56] Thereafter, on March 14, 1957, upon an affidavit of William S. Kenney, Special Attorney of the Department of Justice, sworn to March 14, 1957, Judge Murphy signed an order requiring Alfred K. Stern to show cause on March 26, 1957, why he should not be punished for contempt for his failure to obey a subpoena of this Court. The order provided that it was to be served by a Consul General or Consul of the United States of America within the Republic of Mexi o at least seven days prior to March 26, 1957. A simil r order was made regarding respondent Martha Dodd Stern.

On March 21, 1957, on the affidavit of John T. Moran, Jr., Assistant United States Attorney, sworn to March 21, 1957, Judge Murphy amended his orders of March 14, 1957 in the following respects:

It was ordered that the return date of the orders to show cause be April 15, 1957, instead of March 26, 1957,

and that service be made upon Alfred K. Stern and Martha Dodd Stern at least seven days before April 15, 1957.

A copy of the order of March 21, 1957, together with Mr. Moran's affidavit of March 21, 1957, was served upon Alfred K. Stern on April 1, 1957 in Mexico City, by W. John Wilson, Jr., American Consul at Mexico City.

[57] A set of similar papers was served upon Martha Dodd Stern at the same time and place and by the same Consul. No copy of the original orders to show cause of March 14, 1957, was served upon either Alfred K. Stern or Martha Dodd Stern.

On the return date of the motion to punish for contempt, that is, on April 15, 1957, it was adjourned to April 25, 1957, at the request of counsel who appeared specially for the respondents.

At the hearing on April 25th, said counsel for the respondents entered a special appearance on their behalf for the purpose of moving to dismiss or annul this proceeding on the following grounds:

"1. This Court has not obtained and does not have jurisdiction of their person or of this proceeding and is without jurisdiction or power to entertain or proceed herewith;

"2. Title 28, Sections 1783-1784 U. S. C. under which or pursuant to which this proceeding is purportedly being maintained do not authorize or warrant the institution or maintenance of this proceeding; and in so far as said Sections 1783-1784 are attempted to be applied or be deemed applicable against them in this proceeding, it is unconstitutional, in [58] violation of their constitutional rights and liberties and constitutes a denial of due process of law.

"3. The subpoenas referred in the orders to show cause, dated March 21, 1957 for the alleged disobedience of which

this proceeding was instituted were illegal and void, did not constitute lawful mandates of this Court and were not such mandates which they were required to obey and that the alleged orders pursuant to which said subpoenas were and are purportedly issued were and are illegal and void.

"4. An alleged order purportedly issued herein by the Honorable Thomas F. Murphy, District Judge, on March 14, 1957 was never served upon them or either of them and cannot be deemed applicable to a part of this proceeding; and that the orders and subpoenas allegedly served upon them do not support and are not valid, sufficient or proper to give, and do not give this Court jurisdiction in the matter."

The basic validity of the service of the subpoena and any jurisdictional facts relating to the service and validity thereof were determined by Judge Murphy on the motion aforesaid. Judge Murphy based his decision upon Judge Noonan's determination in United States of America versus Leff, supra.

[59] I agree fully with Judge Murphy's decision and with the determination and reasoning set forth by Judge Noonan in the Leff case. Section 1783 of Title 28, United States Code, is sufficient to authorize the service of a valid subpoena under the conditions appearing herein. This question, therefore, in my opinion, has been properly determined and I see no reason why I should conclude differently. Consequently, objections 1, 2 and 3 are not pertinent to this hearing and are overruled.

As to the fourth objection, which was pressed by the attorney who appeared specially for the respondents, it is my opinion that it is of no merit under the circumstances herein. Although Judge Murphy's order of March 14, 1957, was not served upon either of the respondents, his amended order of March 21, 1957 was served upon each respondent.

*Opinion*

Section 1784 of Title 28, United States Code, with respect to notice, provides:

"(a) A Court of the United States which has issued a subpoena served personally in a foreign country may order the witness who has failed to appear as directed therein to show cause before it at a designated time why he should not be punished for contempt."

[60] The Court had ordered the witnesses to show cause before it at a designated time why they should not be punished for contempt, and the order likewise directs appearance.

The amended order of March 21, 1957, refers to the previous order, the affidavit of Assistant United States Attorney Moran, sworn to March 21, 1957, likewise refers to the previous order; the amended order sets forth the time and place at which the application was to be made and specifies the time of service. Thus there can be no doubt that adequate notice was given since each respondent received notice of the hearing to be held, together with the reason therefor. This, in my opinion, is adequate and sufficient.

The fact that the subpoenas which were served contains a reference to the sum of $250 does not limit the fine to said amount. The statement in the subpoenas is as follows:

"And this you are not to omit, under penalty of two hundred and fifty dollars, and other penalties of the law."

Manifestly, the Court, in its discretion, may impose such additional penalty as may be required [61] under the circumstances.

I will stop at this point before determining the amount of the fine to ask both counsel for the Government and special counsel as to whether anything is to be added in reference to the amount of the fine.

• • •

## Order Holding Appellant in Contempt

(Record, pages 160-161)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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-[SAME TITLE]

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Upon reading the papers filed in this proceeding from which it appears to the satisfaction of the Court that Martha Dodd Stern, being a citizen of the United States of America, residing in the Republic of Mexico, was on the 27th day of February, 1957, duly served in the City of Mexico in the Republic of Mexico with a subpoena issued upon the order of Honorable John F. X. McGohey, United States District Judge for the Southern District of New York, dated February 21, 1957, made pursuant to Section 1783 of Title 28, United States Code, and with a copy of said order, and at the same time and place was tendered and did accept the sum of money specified in said order to cover the expenses of her travel and attendance as a witness, by the terms of which subpoena and order the said Martha Dodd Stern was commanded to appear on the 14th day of March, 1957, before a Grand Jury empanelled for the Southern District of New York, and an order of this Court dated the 21st day of March, 1957, requiring the said Martha Dodd Stern to show cause on the 15th day of April, 1957, why she should not be punished for her failure to obey said subpoena, having been duly served personally upon the said Martha Dodd Stern on April 1, 1957, and the matter having been adjourned to April 25, 1957, at

which time the said Martha Dodd Stern appeared specially by counsel, and a hearing having been held on said date and testimony having been taken from which it appeared to the satisfaction of the Court that the said Martha Dodd Stern had failed to appear before the said Grand Jury at the time and place specified in said subpoena and order, and after due deliberation and upon the proceedings herein, it is

Ordered that in pursuance of Section 1784, Title 28, United States Code, Martha Dodd Stern be and she hereby is adjudged to be in contempt of this Court; and it is further

Ordered that the same Martha Dodd Stern be and she hereby is fined the sum of $25,000.00 to be satisfied, unless paid, pursuant to Section 1784, Title 28, United States Code.

Dated: New York, New York,
May 6, 1957.

Richard H. Levet,
*U. S. D. J.*

* * *

[An identical order, with identical dates was entered with respect to Alfred K. Stern, Appellant.]

(R. 109)

## Subpoena Card for United States Grand Jury (Alfred K. Stern)

(PHOTOPRINT)

[*For convenience of Court and Counsel this document is bound in on the opposite page.*]

[Identical subpoena card left with Martha Dodd Stern.]

**United States District Court, Southern District of New York**

To ALFRED K. STERN
Calla Oliver Goldsmith
38, Palanco, Mexico D.F.

No. .....

**SUBPENA FOR U. S. GRAND JURY**

**BY VIRTUE OF A WRIT OF SUBPENA, To you directed and herewith shown, YOU ARE COMMANDED and firmly enjoined that, laying all other matters aside, and notwithstanding any excuse, you be and appear in your proper person before the Grand Inquest of the Body of the people of the United States of America, for the Southern District of New York, at a District Court to be held at the U. S. Courthouse, Foley Square, Room ~~535~~ 1401, in the City of New York, in and for the said Southern District, on the 14th day of March, 1957, at 10:30 o'clock in the fore noon of the same day, to testify all and everything which you may know in regard to an alleged violation of Section 371, T.18, U.S.C. on the part of the United States, and not to depart the Court without leave thereof, or of the District Attorney.**

**AND THIS YOU ARE NOT TO OMIT, under penalty of Two Hundred and Fifty Dollars, and other penalties of the law.**

**Dated the 21st day of February, 19 57.**

**By the Court,**

**PAUL W. WILLIAMS,**
*United States Attorney.*

Mr. Moran - Rm.3070

**Note—REPORT AT ROOM ~~535~~ 1401. In order to secure your witness fees and mileage, it is necessary that you shall RETAIN THIS CARD and present same at the United States Attorney's Office, Room 413, upon each day on which you attend court as a witness.** FFI ATLANTA—5-7-42—20M—2254

## Affidavit of United States Consul, Dated April 2, 1957

(143-147)

United Mexican States
Federal District
City of Mexico
Embassy of the United
States of America
} ss

I, W. John Wilson, Consul of the United States of America in and for the Mexico City Consular District, hereby state under oath that I called at Avenida Paseo de la Reforma No. 104, Office No. 502 at 4:45 p. m. on April 1, 1957 and delivered the attached order to Alfred K. Stern to show cause why he should not be punished for contempt for failure to obey the subpoena of the United States District Court, Southern District of New York.

Dated this second day of April, 1957 at Mexico, D. F.

W. JOHN WILSON JR.

Service No. 3057
Tariff Item No. 58
No Fee Prescribed.

(Seal)

## Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter

of

The issuance of a Subpoena upon

ALFRED K. STERN,

a citizen of the United States of America, presently residing in Mexico.

Upon the annexed affidavit of John T. Moran, Jr., Assistant United States Attorney for the Southern District of New York, sworn to the 21st day of March, 1957, and upon all the proceedings heretofore had herein, it is

ORDERED that the Order issued March 14, 1957 by the Honorable Thomas F. Murphy, United States District Judge for the Southern District of New York, upon the application of William S. Kenney, Special Attorney for the Department of Justice, directing Alfred K. Stern to show cause before a term of this Court to be held on March 26, 1957, why he should not be punished for contempt for his failure to obey a subpoena of this Court, be, and hereby is amended in the following respects:

1. ORDERED that Alfred K. Stern, residing in Mexico City, Mexico, show cause before a term of this Court, to be held in Room 318, United States Court House, Foley Square, New York, New York, in the forenoon of April 15,

1957, at the opening of Court on that day, or as soon thereafter as counsel can be heard, why he should not be punished for contempt for his failure to obey a subpoena of this Court, and it is

2. FURTHER ORDERED that the service of a true copy of this Order at least seven days prior to April 15, 1957 by any Consul General or Consul of the United States within the Republic of Mexico or within any country in which the said Alfred K. Stern may be found, shall be sufficient service.

Dated: New York, N. Y., March 21, 1957.

THOS. F. MURPHY
U. S. D. J.

---

## Affidavit of John T. Moran, Jr.

[SAME TITLE]

State of New York,
County of New York,
Southern District of New York—ss.:

JOHN T. MORAN, JR., being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Southern District of New York and as such am familiar with the facts in the above entitled matter.

*Affidavit of John T. Moran, J.*

2. On March 14, 1957 the Honorable Thomas F. Murphy, United States District Judge for the Southern District of New York, upon the affidavit of William S. Kenney, Special Attorney for the Department of Justice, ordered Alfred K. Stern, residing in Mexico City, Mexico, to show cause before a term of this Court, to be held in Room 318, United States Court House, Foley Square, New York, New York, in the forenoon of March 26, 1957, at the opening of Court on that day, or as soon thereafter as counsel can be heard, why he should not be punished for contempt for his failure to obey a subpoena of this Court. It was further ordered that the service of a true copy of this order to show cause at least seven days prior to March 26, 1957, by any Consul General or Consul of the United States, within the Republic of Mexico, or within any country in which the said Alfred K. Stern may be found, should be sufficient service.

3. The American Consul at Mexico City, Mexico has informed your deponent that he was unable to make service of a copy of the Order to Show Cause dated March 14, 1957, within the time prescribed by said Order.

4. Wherefore, your deponent prays that the Order to Show Cause dated March 14, 1957 be amended in the following respects:

a) That Alfred K. Stern, residing in Mexico City, Mexico, show cause before a term of this Court, to be held in Room 318, United States Court House, Foley Square, New York, New York, in the forenoon of April 15, 1957, at the opening of Court on that day, or as soon thereafter as counsel can be heard, why he should not be

punished for contempt for his failure to obey a subpoena of this Court.

b) That the service of a true copy of this Order at least seven days prior to April 15, 1957, by any Consul General or Consul of the United States within the Republic of Mexico or within any country in which the said Alfred K. Stern may be found, shall be sufficient service.

5. No previous application for the relief sought herein has been made to the Court.

JOHN T. MORAN JR.
John T. Moran, Jr.

(Sworn to March 21, 1957.)

[Identical affidavit regarding service of order on Martha Dodd Stern filed on same day.]

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1957**

**No.**

---

ALFRED K. STERN and MARTHA DODD STERN,
*Petitioners,*

*against*

UNITED STATES OF AMERICA,
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable the Chief Justice of the United States and Associated Justices of the Supreme Court of the United States:*

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered February 5, 1958, pursuant to its order of December 5, 1957, which dismissed the Petitioners' appeals from judgments of the District Court for the Southern District of New York adjudging them guilty of contempt and fining each of them $25,000. for disobeying subpoenas served upon them in Mexico for appearance before a Special Grand Jury in New York.

### Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 249 F. 2d 720 and is printed in the Appendix at page 29. The opinion of the District Court is unreported, and is set forth at page 16A of the Appendix to Appellant's Brief in the Court of Appeals filed herewith.

## Jurisdiction

The jurisdiction of this Court is based on 28 U. S. C. Section 1254(1). The order of the Court of Appeals dismissing the Petitioners' appeals unless they paid or secured the payment of their fines within sixty (60) days, was entered on December 5, 1957 and made final by order entered on February 5, 1958 . The time to file this petition was extended to May 5, 1958 by order of an Associate Justice of this Court.

## Question Presented

Where a citizen of the United States, residing in Mexico, moves unsuccessfully to quash a subpoena served upon him in Mexico to appear and testify before a Special Grand Jury in New York, and is adjudged in contempt of Court for his failure to comply with such subpoena and is fined $25,000., may the Circuit Court of Appeals dismiss his appeal, timely taken and fully perfected, unless he complies with its order that he pay or deposit security for the payment of the fine?

## Statutes Involved

In 1926 Congress enacted the Walsh Act (Pub. 483, 69th Cong.; 44 Stat. 835; former 28 U. S. C. §§ 711, 712), which provided, in relevant part:

"WALSH ACT

(Public—No. 483—69th Congress)
(S. 1035)

An Act Relating to Contempts.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That whenever letters rogatory shall issue out of any court of the United States, either with or without interrogatories addressed to

any court of any foreign country, to take the testimony of any witness, being a citizen of the United States or domiciled therein, and such witness, having been personally notified by it according to the practice of such court, to appear and testify pursuant to such letters rogatory and such witness shall neglect to appear, or having appeared shall decline, refuse, or neglect to answer to any question which may be propounded to him by or under the authority of such court, to which he would be required to make answer were he being examined before the court issuing such letters, the court out of which said letters issued may upon proper shewing order that a subpoena issue addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

Sec. 2. Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpoena issue, addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated."

In the 1948 Revision and Codification, Sections 711 and 712 of the Walsh Act became Sections 1783 and 1784 of Title 28, U. S. C.:

"1783. SUBPOENA OF WITNESS IN FOREIGN COUNTRY.

(a) A court of the United States may subpoena, for appearance before it, a citizen or resident of the United States who:

(1) Has been personally notified in a foreign country to appear before a court thereof to testify

pursuant to letters regatory issued by such court of the United States, and who has failed to appear or has failed to answer any question which he would be required to answer were he being examined before such court of the United States; or

(2) is beyond the jurisdiction of the United States and whose testimony in a criminal proceeding is desired by the Attorney General.

(b) The subpoena shall designate the time and place for appearance before such court of the United States, and shall issue to any United States consul in such foreign country. The consul shall make personal service of the subpoena and any order to show cause, rule, judgment or decree on the request of the court of the United States or its marshal, and shall make return thereof to such court after tendering to the witness his necessary travel and attendance expenses, which shall be determined by such court and sent with the subpoena.

Sec. 1784. CONTEMPT.

(a) A court of the United States which has issued a subpoena served personally in a foreign country may order the witness who has failed to appear as directed therein to show cause before it at a designated time why he should not be punished for contempt.

(b) If security is given for any damage which the witness might suffer should the charge be dismissed, the court may direct, as a part of such order, that any property of the witness within the United States be levied upon or seized in the manner provided by law or court rules governing levy or seizure under execution, and held to satisfy any judgment that may be rendered against the witness. The security required by this subsection shall not be required of the United States.

(c) The Marshal making such levy or seizure shall forward to any United States counsel within the country where the witness may be a copy of such order and a request that the counsel make personal service of the order on the witness. The marshal shall also cause the order to be published once each

week for six consecutive weeks in some newspaper of general circulation in the district where the court which issued the order sits.

(d) On the return day of such order or any later day to which the hearing may be continued, proof shall be taken. If the charge of recusancy against the witness is sustained, the court may adjudge him guilty of contempt and, notwithstanding any limitation upon the power of the court generally to punish for contempt, may fine him not more than $100,000 and direct that the fine and costs of the proceeding be satisfied unless paid by a sale of the property levied upon or seized, such sale to be conducted upon the notice required and in the manner provided for sales upon execution. Any such judgment rendered upon service by publication only may be opened for answer within one year."

18 U. S. C.:

"Sec. 401. POWER OF COURT.

A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

* * *

3. Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

* * *

Federal Rules of Criminal Procedure:

"Rule 38. STAY OF EXECUTION, AND RELIEF PENDING REVIEW.

(a) Stay of Execution.

* * *

(3) FINE. A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the direct court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

* * *

RULE 54. APPLICATION AND EXCEPTION.

(b) Proceedings.

* * *

(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; * * * or to proceedings against a witness in a foreign country under Title 28, U. S. C. A. 1784."

## Statement of the Case

In March 1957 subpoenas commanding the Petitioners to appear and testify before a Special Grand Jury in New York were served on them in Mexico City, Mexico, where they had been residing for several years. The subpoenas contained the admonition "this you, or any of you are not to omit, under the penalty upon you, and every of you, of Two Hundred and Fifty Dollars".

Each of these subpoenas was issued pursuant to an order of Judge McGohey of the District Court for the Southern District of New York, based upon an affidavit of John T. Moran, Jr., an Assistant United States Attorney for the Southern District of New York, asserting: that the Petitioners are citizens of the United States residing in Mexico; that the Attorney General desires their testimony "in a criminal proceeding before the January Special Grand Jury for the Southern District of New York on March 14, 1957" and that the authority for requesting such order and subpoenas was Title 28 U. S. Code Section 1783.

Mr. Moran's affidavit did not specify the particular criminal proceeding referred to in the affidavit, and contained no statement as to the pendency of any particular criminal proceeding or action in any Court of the United States; did not identify the parties to any such criminal action or proceeding; did not identify any defendant, nor did it refer to any criminal action or proceeding pending in any Court before which the Petitioners were to appear and testify nor did it allege or suggest that the Petitioners had or were in possession of any knowledge or information

that was relevant, material or necessary in such criminal action or proceeding.

The Petitioners appeared specially and moved to quash the subpoenas and set aside the orders on grounds, among others: that the subpoenas and orders were unauthorized and void; that no criminal action or proceeding was pending in any Court of the United States in which their testimony was desired; that there was no showing or even claim that the Petitioners or either of them possessed any information or knowledge relevant or necessary to any pending criminal action or proceeding; that the subpoenas did not require them to appear before a Court in any adjudicative proceeding, but before a Grand Jury conducting an investigation; and that the subpoenas were not lawful mandates of the Court which the Petitioners were required to obey.

The motions were denied by Judge Murphy on the eve of the Petitioners' specified appearance, and on the same day, orders were signed returnable March 26, 1957 requiring the Petitioners to show cause why they should not be punished for contempt. These orders and their supporting affidavits were not served upon the Petitioners. They were however served in Mexico with copies of an order signed by Judge Murphy, a week later, purporting to amend the order of March 14th by making the return date of the motion April 15, 1957. The affidavits upon which these amending orders were based, contained no specifications relating to the accusation or grounds of the contempt.

The Petitioners then moved to vacate the orders of March 14th which had not been served on them and to dismiss the proceeding. The Court denied the motions, found the Petitioners guilty of contempt and fined them $25,000. each, to be satisfied by the Marshal out of any of Petitioners' property seized within the United States.

No supersedeas or other stay, in whole or in part, were requested by or granted to the Petitioners.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 977

ALFRED K. STERN and MARTHA DODD STERN,

*Petitioners,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PAUL O'DWYER,
*Attorney for Petitioners,*
40 Wall Street,
New York 5, New York.

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irrelevant to this discussion, "were made in phraseology." (See also H. Rep. 208, 80th Cong., on this point.)[2]

Professor Moore has noted that sections 1783 and 1784 "substantially carry out the provisions of the Act of July 3, 1926." (Moore's Commentary on the United States Judicial Code (1949), p. 364).

It would be a startling and unique reversal of settled rules of statutory interpretation to hold that in enacting the 1948 Codification, Congress intended to effect a substantial change in the scope and meaning of the Walsh Act, when such change is neither required by the language employed, nor identified or explained as such in the Reviser's Notes.

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[2] The same intention to improve style, not to make material changes in the law, appears in the statements made by the proponents of the legislation before the House Committee on the Judiciary in March of 1947 (Hearings before Subcom. No. 1, H. Rep. Com. on the Judiciary, 80th Cong., 1st Sess., on H. R. 1600 and H. R. 2055).

Charles J. Zinn, law revision counsel of the Committee on the Judiciary, said:

> "In the work of revision, principally codification, as we have done here, keeping revision to a minimum, *I believe the rule of statutory construction is that a mere change of wording will not effect a change in meaning unless* a clear intent to change the meaning is evidenced.
>
> To find out the intent, I think the courts would go the report of the committee on the bills and these reports are most comprehensive. We have incorporated in them Mr. Barron's notes to each section of the bills, both criminal code and the judicial code.
>
> It is clearly indicated in each of those reviser's notes whether any changes was intended so that merely because we have changed the language—we have changed the language to get a uniform style, to avoid awkward expression, to state a thing more concisely and succinctly—*but a mere change in language will not be interpreted as an intent to change the law unless there is some other clear evidence of an intent to change the law*" (p. 40) italics added. (See also, U. S. Code Cong. Sen. Pamph. pp. 1980-81.)

During the six years after the 1948 codification, there was no effort to apply Section 1783 to any situation or case beyond the terms of the original enactment. It was not until Judge Noonan of the District Court of the Southern District of New York wrote his opinion in the case of *United States* v. *Leff* (Crim. 143-309 Op. No. 21148), that any Attorney General claimed or any Judge held that Section 1783 authorized the issuance of a subpoena requiring a citizen abroad to return for a Grand Jury investigation.

Meanwhile, however, the State Department had declared, as late as August 1, 1952, that the Judicial Code merely "reenacted" the Act of July 3, 1926 (2 Foreign Service Manual, Sec. 874.3). Rule 17 of the Federal Criminal Rules continued for a year after enactment of the Code to make reference to the "Act of July 3, 1926". The words "Title 28 U. S. C. Sec. 1783" were inserted in a later amendment only for the purpose of making "proper reference to Title 28" as the Advisory Committee stated in "Explanatory Statement to Accompany amendments to the Federal Rules of Criminal Procedure" (H. Doc. 30, 81st Cong., 1st Sess., p. 5).

## 3.

## The subpoenas in question did not constitute lawful mandates, which the Petitioners were required to obey.

The Walsh Act, as originally enacted, provided that the "judge of the court before which such action is pending" may order a subpoena to issue "commanding such witness to appear before the said court" (former 28 U. S. C. 712).

In the streamlining process of codification, Section 1783 modified this to provide that a "Court of the United States may subpoena for appearance before *it*, a citizen or resident of the United States who * * * (2) is beyond the juris-

diction of the United States and whose testimony in a criminal proceeding is desired by the Attorney General.

To appear to give testimony in a criminal proceeding before *it*, is to appear before the Court in which such proceeding is actually pending.

However, Judge McGohey's order authorized the issuance of a subpoena commanding the appellants to appear before "the January Special Grand Jury for the Southern District of New York" (R. App. 4a).

The Grand Jury is not a Court, and is not a place for the exercise of judicial power.

A "court" is

> "a tribunal empowered to hear and determine issues between parties, on pleadings entered oral or written, and on evidence to be adduced under defined and established rules, according to the settled principles of law." *State* v. *Columbia*, 17 S. C. 80, 82.
>
> "A tribunal presided over by one or more judges for the exercise of such judicial power as has been conferred upon it by law" (*Von Schmidt* v. *Widber*, 99 Cal. 511, 512).
>
> "A court 'requires for its existence the presence of its judges, or a competent number of them, and a clerk, at or during which, and at a place where it is, by law, authorized to be held and the performance of some public act indicative of the design to perform the functions of a court." *In re Terrill*, 52 Kan. 29, 31.

The composition, attributes and tradition of a court are quite different from those of a Grand Jury, and the differences all go to emphasize that, related though a Grand Jury may be to the court, it is not *the* court, any more than its relationship to the prosecutor makes it *the* prosecutor.

As this Court said in *Re Oliver*, 333 U. S. 257, 264-5:

> "Grand Juries investigate and the usual end of their investigation is either a report, a 'no bill' or an indictment. They do not try and they do not convict. They render no judgment."

In *Spector* v. *Allen*, 281 N. Y. the appellant had "wilfully refused to produce before the Grand Jury a paper which the foreman of the Grand Jury directed him to produce. He deliberately removed that record from the jurisdiction of the Court". The question presented to the Court of Appeals was whether in so doing, appellant had disobeyed a mandate of the court to produce the paper. The Court held in the negative, saying:

> "The grand jury is an arm of the court, but it is not the court."

In *U. S.* v. *Thompson*, 251 U. S. 407 this Court adopted as its own the statement of the Solicitor General:

> "that the power and duty of the Grand Jury to investigate is original and complete * * * and is not, therefore dependent for its exercise upon the approval or disapproval of the court."

There is sound reason for applying Section 1783 to trials, actions or proceedings actually pending in Court only and not applying it to Grand Jury investigations.

The distinction between the investigative steps *i. e.*, Grand Jury proceedings—and the adjudicative steps—*i. e.*, "criminal proceeding"—had long been recognized and was firmly established by 1948.

A leading case on the point is *Post* v. *United States*, 161 U. S. 583, 567, where the Supreme Court said:

> "The submission of a bill of indictment by the attorney for the government to the Grand Jury, and the examination of witnesses before them, are both in

> secret, and are no part of the criminal proceedings against the accused, but are merely to assist the Grand Jury in determining whether such proceedings shall be commenced; and the Grand Jury may ignore the bill, and decline to find any indictment; and it cannot be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open Court."

Historically, the Grand Jury investigation has always been recognized as different in kind and quality from the proceeding which determines issues of law and fact in a criminal case.

In *People* v. *Sexton*, 187 N. Y. 495, the Court per Werner, Jr., said at page 513:

> "A Grand Jury, although for some purpose a part of the Court in connection with which it is convened, is in some aspects a separate and independent tribunal, free from the restraint of the Court, and at liberty to decide upon its own methods of procedure in so far as they are not controlled by statute or immemorial usage having the force of law. One of the attributes and powers of this independent existence is to decide when and in what order witnesses shall be called, and to some extent, who shall be called. For all the ordinary purposes of procuring evidence a Grand Jury is a distinct body clothed with authority to conduct the examination of witnesses in any way that does not conflict with established legal rules. The Court has no general control over witnesses summoned before a Grand Jury except to punish them for contumacy or contempt * * *"

Ballantine's Law Dictionary, 1948 Ed. page 312, defines "criminal proceeding" as the "prosecution of a person charged with a criminal offense contemplating the conviction and punishment of the person so prosecuted". As this Court said in *Post* v. *United States*, 161 U. S. 583:

> "Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made

> against the accused, either by indictment presented or information filed in Court, or at the least, by complaint before a magistrate. *Virginia* v. *Paul*, 148 U. S. 107, 119, 121; *Rex* v. *Phillips Russ & Reg.*, 369; *Regina* v. *Parker Leigh and Cave*, 459."

When it was provided in Rule 12(a) of the Criminal Rules that the "pleadings in criminal proceedings shall be the indictment", etc., the rule-makers gave recognition to the well-established principle that a criminal proceeding commenced only when a Grand Jury proceeding had concluded with the indictment.

In *Adams* v. *State*, 214 Ind. 603, the Court said:

> "The Grand Jury is not a judicial tribunal, but rather an informing or accusing body. While an appendage of the Court it does not conduct its proceedings judicially, and when after its secret ex parte investigation it finds and returns to the Court an indictment against a defendant is ended. It is clear, therefore, that the investigation of a Grand Jury is a proceeding which is wholly separate and distinct from, and of a different nature than, the subsequent trial of the defendant in the district court."

The numerous references in the new Title 28, the recodification of Title 18, and the promulgation of the Federal Rules of Criminal Procedure, all of which employ the phrase "criminal proceeding", are intelligible only as referring to the adjudication of the criminal responsibilty of one or more identified accused. Both the context and the history of the words exclude from that scope the preliminary investigation leading to the accusation, whether conducted by Grand Jury or other inquisitorial or informing body.

It is only after a charge against a defendant is made that a criminal proceeding is thereby begun. It is then the duty of the Attorney General to conduct the trial and

present evidence to establish that charge in Court. To that end, he issues subpoenas to witnesses whose testimony he desires without application to the Court. However, when it comes to a citizen residing abroad, Congress saw fit to limit the right to subpoena such non-residents, primarily because it involved making possible heavy sacrifices, jeopardizing substantial business interests, travelling thousands of miles at great inconvenience and then likely find that their testimony was unnecessary or unimportant. The Attorney General is therefore required to apply to the Court for the right to issue a subpoena to such witness, and necessarily show, for that purpose, to the Court sufficient facts to justify the request, so that the Court may be in a position to exercise its judicial discretion in the matter.

In interposing this barrier of procedural safeguard between the power of the government and the right of the individual, the Court performs its highest function.

While the Attorney General is in charge of trials of criminal proceedings following a charge, he is not in control of the Grand Jury investigation, or its proceedings. He may assist and advise, but he cannot dictate or even choose. When Congress spoke of testimony desired "by the Attorney General", it obviously referred to testimony desired by him in a criminal proceeding which he had to conduct or of which he was in control.

Congress knew how to compel testimony in Grand Jury investigations when it wanted to do so, and even there, it took the precaution to limit the coercive subpoena to cases "where it is necessary in the public interest". In the Compulsory Testimony Act of 1954, as contained in 18 U. S. C. Sec. 3486(c):

> "Whenever in the judgment of the United States Attorney the testimony of any witness * * * in any case or proceeding before any grand jury or court of the United States * * * is necessary to the public interest * * *"

The use of the phrase "criminal proceeding" elsewhere in Title 28, and in the contemporary codification of Title 18, gives compelling support to the conclusion that Grand Jury investigations are not embraced within that phrase. For example: 28 U. S. C. Sec. 753(f): ("fees for transcripts furnished in criminal or habeas corpus proceeding"); 28 U. S. C. Sec. 1918 ("District Courts; fines, forfeitures and criminal proceedings * * *"); 18 U. S. C. Sec. 3144 ("judgment of State Court in any criminal proceeding"); 18 U. S. C. Sec. 3570 ("Judgment * * * in any criminal proceeding").

**4.**

**The Statute must be construed to require a factual showing sufficient to justify the Court in acting to issue the subpoena.**

When Congress wrote into the Statute the requirement that the Attorney General must apply to the Court for permission to issue a subpoena to a non-resident witness, it recognized, with evident realism that while the Attorney General is the Government's Chief Law Officer, he is at the same time an important political figure in any administration; that a prosecution or criminal proceeding conducted or supervised by him may become or be part of a political cause to mold public opinion or promote the interests of the political party in power and therefore limited his power to recall non-resident citizens at will, on the mere plea that he desired their testimony. More was required.

He must apply to a court, which is not an auxiliary of the Attorney General but exercises its functions judicially and independently. It follows that in acting upon an Attorney General's application for such subpoena the Court would necessarily have to be furnished with all pertinent facts necessary to establish his right to, as well as his need for, the desired testimony and the extraordinary circum-

Thereafter, the Petitioners duly filed notices of appeal, fully perfected their appeals in accordance with the Rules of the Court, and served and filed their briefs. Following the filing of such briefs, and after July 1957 the U. S. Attorney twice requested and was granted additional time to file the Government's briefs. On November 4, 1957 the appeals appeared for argument on the Calendar of the Court of Appeals, at which time the Government moved, by notice of motion returnable that day and served with its briefs a few days before, to dismiss the Petitioners' appeals on the grounds that the Petitioners had liquidated their American assets and had departed from Mexico to Czechoslovakia in July 1957.

The Court of Appeals, after hearing argument on the merits of the appeal and on the motion to dismiss, entered an order dated December 5, 1957 directing that the appeals be dismissed unless Petitioners deposited the amount of their fines or gave security for such payment within sixty days. No such deposit or security having been made or tendered, judgment dismissing the appeal was entered on February 5, 1958.

## Reasons Relied on for the Allowance of the Writ

Two important questions of federal law which have not been, but should be settled by this Court are here involved. Both questions were decided below contrary to the applicable statutes and decisions of this Court.

The basic question is: Whether a subpoena, purportedly issued pursuant to 28 U. S. C. Sec. 1783, commanding a citizen residing abroad to appear and testify before a Grand Jury within the United States is valid, without a showing that the testimony of the non-resident witness is to be given before a Court, and is material and necessary to a criminal proceeding or action then pending in that Court.

The Petitioners who failed to comply with such subpoenas served upon them abroad were held in contempt of

Court and fined $25,000 each although the subpoenas themselves specified a penalty of $250 in the event of failure to obey.

They duly appealed to the Court of Appeals, and duly perfected their appeals and filed their briefs. The second question then arises: May the Court of Appeals impose as a condition of prosecuting their appeals a requirement that they deposit or give security for the payment of the fines and in default thereof, dismiss their appeals?

These questions are of great importance in view of the countless thousands of citizens now travelling or residing abroad and who, if the Attorney General may thus compel non-resident citizens to return to the country to testify before any of the numerous Federal Grand Juries sitting within the United States investigating unspecified matters, may be subject to his whim without regard to the necessity, materiality or relevancy of the desired testimony or the witness' knowledge of matters pertinent to the investigation.

## 1.

### No power exists to condition review of a duly perfected appeal on filing security for payment of a fine.

The jurisdiction of the Court of Appeals is governed by statute. Section 1291 of Title 28 prescribes that such Court "shall have jurisdiction of appeals from all final decisions of the District Court of the United States". This Court has declared that where a statute provides for an appeal, and its terms are complied with, the review of the appellants' grievance is "an absolute right which we cannot refuse or deny" *Mason* v. *N. W. Insurance Co.*, 106 U. S. 163, 165, and that an "appeal gives the upper Court a power of review and not one of intervention" *Cohen* v. *Beneficial Loan*, 337 U. S. 541, 546. The Court of Appeals for the Third Circuit has correctly said: "Our jurisdiction is not discretionary; it is settled by statute" *Cohen* v. *Globe Indemnity Co.*, 120 F. 2d 791.

This Court has also declared that "a party ought not to be deprived of his right of appeal upon the terms which the law prescribes," *Kountze* v. *Omaha Hotel Co.*, 107 U. S. 378, 395.

The power to require a bond to secure a stay, or a supersedeas has never been construed to curtail the right of appeal, where such stay or supersedeas was not sought.

No stay or supersedeas was sought or granted here.

In *Lewis* v. *Holmes*, 194 Fed. 842, the District Judge required as a condition for the appeal that the complainants, who sought no stay, file a bond in a large amount. The Court of Appeals pointed out that when a bill of review is filed within the time allowed by law, the right to proceed is "a right of course" and nullified the condition saying:

> "This requirement is neither reasonable in the amount named for the bond, nor authorized under the statute, as no supersedeas is mentioned or involved therein. Appeal from a final order or decree in equity is a matter of right, to be allowed by the trial court when sought, as of course, without other conditions than the filing of the usual bond for costs of the appeal."

> "At common law an undertaking on appeal was never required. 1 Enc. Pl & Pr. 965, and cases cited. It is purely a statutory regulation, and unless the statute specifically makes such requirement, it cannot be exacted at all * * *" *State ex rel. Hodgden* v. *District Court*, 82 Pac. 663, 33 Mont. 117.

In *Connley* v. *United States*, 41 F. 2d 49, an order fixing bail pending an appeal from a conviction, required that the bail bond contain a condition that it should also operate as a supersedeas to a judgment for the payment of the fine. This was held improper.

In *Cain* v. *U. S.*, 148 F. 2d 182, an order requiring, in addition to a reasonable amount of bail for the appearance of the appellants, that a supersedeas bond be given to pay the amount of the fine, was held improper as requiring excessive bail.

Federal Judge Yankewitch, *Release on Bond by Trial and Appellate Courts*, 7 F. R. D. 271, says at 281:

> "Following the enactment of the new rules, and deeming ourselves justified by the second clause of Subdivision A(1)(3) of Rule 38, some of us adopted the custom of requiring, in cases in which both imprisonment and a fine were imposed—as a condition for granting bail on appeal—the deposit of the amount of the fine in the registry of the Court to abide the result of the appeal * * * But on January 29, 1947 the Circuit Court of Appeals told us we misread the clause, and that it does not allow us to condition bail on such deposit *unless the defendant desires to stay payment of the fine.* The Court made the ruling without writing an opinion, in the case of *United States* v. *Bleker and Robinson* * * * they invalidated the portion of the Order requiring the deposit on the ground that such deposit constituted excessive bail under their prior rulings." (Italics in original.)

The essence of all these cases is that "statutory review is important and must be exercised without discrimination" (*National Union* v. *Arnold*, 348 U. S. 37, 43).

The Court below imposed the condition here involved in reliance upon the *Eisler* case (338 U. S. 189), saying it could "see no valid distinction between this case and that of Eisler".

To begin with, in *Eisler's* case there was an indictment, a trial, a conviction and an affirmance by the Court of Appeals. Eisler had applied for and obtained his freedom pending his appeal on his undertaking to remain subject to

the Court's jurisdiction. Eisler violated his undertaking to the Court and removed himself from the Court's jurisdiction.

Here, there was no stay, no supersedeas, no order or direction which was violated. The Petitioner's funds alleged to have been liquidated were not under the Court's jurisdiction or subject to its orders. The alleged liquidation referred to by the Government, was not restrained or sought to be restrained and occurred before the District Court judgment. The Petitioners were not within the territorial limits of the United States when the proceeding was started or at any time during its pendency and it is of no consequence whether the Petitioners resided in Mexico or Czechoslovakia pending the determination of their appeal. Non-residence is no ground for dismissing an appeal, nor may the Court dismiss an appeal as punishment for failure to give security, when there is no such requirement in the statutes.

What the Court has done in this case was to give the provisions of the Contempt Statute a broad construction contrary to the holdings of this Court, which has always given that statute a narrow construction, and as "embodying a Congressional plan to limit the Court's Contempt power to the least possible power adequate to the end proposed. The exercise by Federal Courts of any broader contempt powers than this would permit too great inroads on the procedural safeguards of the Bill of Rights". *Cammer v. U. S.*, 350 U. S. 399. It is a principle of natural justice and of the true administration of justice, that when nonresident citizens are sought to be compelled to give up their places of sojourn abroad and their business and to return to their country for purpose of uncertain and unspecific necessity or materiality, and failing to do so, are heavily fined, they are at least entitled to resist and defend such action, and the right of an appeal is inseparable from their right of defense.

In the absence of specific Constitutional or Statutory authority, the Court of Appeals had no right to dismiss the Petitioners' appeal, timely taken and fully perfected; and the dismissal in this case constituted a deprivation of constitutional rights and denial of due process under the Fourth and Fifth Amendments to the Constitution.

## 2.

**The statute, as codified, did not authorize the subpoenas in question.**

It has been long settled: that where legislation affecting a particular subject matter has undergone revision and consolidation, by codification, the revised sections will be presumed to bear the same meaning as the original sections (even though reworded and rephrased), unless the intent to effect a change is clearly and indubitably expressed. 2 Sutherland, Statutory Construction Section 3709, page 225.

> "It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed."
> *United States* v. *Ryder*, 110 U. S. 729, 740.

In *Federal Reserve Bank of Dallas* v. *Webster*, 287 F. 579, 586, the Court said:

> "In construing the revised statutes the presumption is against an intention to change the meaning and construction of a statute re-enacted therein. Mere changes in phraseology arising from a condensation are not to be regarded as changing the pre-existing law. * * * A change of the law by revision will not be presumed, unless the language in the revision cannot possibly bear the same construction as the revised and repealed act."

The entire explanation for the language changes appearing in 1783 is expressed in the Official Reviser's Notes as follows:

> "Based on Title 28 U. S. C. 1940 ed. 711, 712, and 713 (July 3, 1926 ch. 762, Secs. 1-3, 44 Stat. 835). Word 'resident' was substituted for 'or domiciled therein' (See reviser's note under section 1391 of this title).
>
> Words 'or any assistant or district attorney acting under him' after 'Attorney General' in section 712 of Title 28, U. S. C. 1940 ed. were omitted since in any event, the approval of the Attorney General would be required. (See section 507 of this title.)
>
> Changes were made in phraseology." [1]

In the District Court, the Government conceded that the statute (Walsh Act) as originally enacted "specifically related to the trial of criminal actions and therefore by its very words excluded its application to Grand Jury proceedings" and contended that the changes in phraseology in the 1948 codification where the phrase "criminal proceedings" is used instead of "criminal action" expanded the scope of the statute to include subpoenas for Grand Jury investigation.

This question is of considerable importance and has never been passed on or considered by any Appellate Court.

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[1] Mr. William W. Barron, Chief Reviser of Title 28 U. S. C. in his article on "The Judicial Code, 1948 Revision," 8 F. R. D. 439, 441, 445, said:

> "There was no purpose on the part of the Revision Staff to effect any change in existing law. Despite this, the process of comprehensively examining and rewriting the Code disclosed some grave disparities, inconsistencies and ambiguities not correctable by mere codification. This was due in part to forty years of piecemeal amendment to the 1911 Judicial Code. Some such problems had manifested themselves in difficult and not wholly satisfactory judicial interpretations. The Reviser and the Advisory Committee, upon discovering situations which would not yield to codification, felt in duty bound to apprise Congress of their findings and

In *Feres* v. *United States*, 340 U. S. 135, this Court referred to the codification changes in the 1948 Code, saying:

> "In recodifying Title 28 of the United States Code, changes in language were made * * * we attribute to this change of language no substantial change of law."

The report of the House Committee on Revision of the Laws to accompany H. R. 712 (H. Rep. 2646, 79th Cong., 2nd Sess. July 24, 1946) also showed the reported bill was not intended to make substantive changes.

Nowhere, either in the Reviser's Notes to Sections 1783 and 1784, or in the proceedings in Congress or elsewhere, does it appear that the use of the words "criminal proceeding" was intended to make a substantive change in the scope of the Walsh Act. On the contrary, it is everywhere made clear that the only changes, other than those specifically referred to in the notes, which refer to matters

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recommendations. Consequently, a few such changes, substantive in nature, were recommended to Congress. These were carefully outlined in the Reviser's Notes, and fully considered by the Judiciary Committees of both houses * * *" (at p. 441).

"Because of the necessity of consolidating, simplifying and clarifying numerous component statutory enactments no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expresse'

Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.

Congress recognized this rule by including in its reports the complete Reviser's Notes to each section in which are noted all instances where change is intended and the reasons therefor" (pp. 445-6).

The opposing affidavit made by the appellants' attorney denies none of the foregoing facts. It says not a word about their liquidating their assets nor suggests that they have any assets remaining in the United States.

Upon the record before us, the conduct of the appellants in liquidating their American assets, abandoning their United States citizenship and going to Czechoslovakia, shows a determined effort to deprive the court of power to execute its mandate if the judgment on appeal should be affirmed. Here we have an undisputed, studied, and successful attempt to render the court powerless to enforce its decree. We see no valid distinction between this case and that of Eisler v. United States, 338 U. S. 189, dismissed 883. Accordingly, we direct the Clerk of the Court to enter an order dismissing the appeal unless within 60 days from the date of this opinion the appellants shall deposit the amount of their fines and costs in the registry of the district court or give bond for the payment thereof.

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SUPREME COURT, U. S.

# Supreme Court of the United States

**October Term, 1957**

**No. 977**

ALFRED K. STERN and MARTHA DODD STERN,

*Petitioners,*

*against*

UNITED STATES OF AMERICA.

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PAUL O'DWYER,
*Attorney for Petitioners.*
40 Wall Street,
New York 5, New York.

IN THE

# Supreme Court of the United States

**October Term, 1957**

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ALFRED K. STERN and MARTHA DODD STERN,
*Petitioners,*

*against*

UNITED STATES OF AMERICA.

---

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Government does not deny the importance, nor does it dispute the substantiality of the basic question presented by the petitioners to the Court of Appeals, namely, that the subpoenas, for failure to obey which they were held in contempt, were void, unauthorized by law, and did not constitute lawful mandates of the Court.

The Court of Appeals was persuaded to refrain from passing on the merits of the petitioners' appeal, duly and timely perfected, by prejudicial hearsay assertions and characterizations which petitioners' counsel had no opportunity to answer in the few days permitted by the last minute notice to dismiss.

The Government, referring to the rules governing criminal appeals, raises a question as to the "timeliness" of the petition.

In *Nye* v. *United States*, 313 U. S. 33, this Court held that an appeal from a judgment of criminal contempt is

stance which rendered it proper to require the non-resident witness to give up his business, or other activity abroad, and return to this country at the risk of great penalties. Congress realized that such procedure would serve to protect both the public interest and the rights of the non-resident witness.

An application to a court must be based upon sufficient, valid and legal grounds. If the Attorney General's mere desire to have the witness testify were deemed sufficient in itself, there would be no necessity for making provision for any application to the Court.

It is even doubtful whether the Attorney General can delegate the power to make such application to an Assistant United States Attorney without a specific showing that he expressly authorized or approved it. In *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, the Court was considering whether an Administrator, who by statute was given the authority to sign and issue subpoenas, could delegate that power to Regional Directors. This Court held that he could not, saying:

> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. Under the present Act, the subpoena may, as in this case, be used to compel production at a distant place of practically all of the books and records of a manufacturing business, covering considerable periods of time. True there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form and official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litiga-

tion. All these are cogent reasons for inferring an intention of Congress not to give unrestricted authority to delegate the subpoena power which it has in terms granted only to the responsible head of the agency."

In the present proceeding, the Court was not furnished by the Attorney General with any statement whatever, not even a statement that he authorized, approved or even had knowledge of the application. Nor was there any statement specifying or identifying the criminal proceeding in which the testimony of the petitioners was desired, or that either of them had ever testified before any Court or Grand Jury with respect to matters that the Attorney General desired to have them testify or that they had any knowledge or information which would render their testimony material or of assistance in any criminal proceeding conducted by the Government; or that there existed any necessity or emergency which would justify the compulsion of their return to this country, on the pain of penalties.

In the Court below the Government contended that it was not necessary to present any facts to the Court other than a statement, without more, that the Attorney General "desired" their testimony; in other words that the Court was to be treated merely as a rubber stamp to be applied on the Attorney General's mere request.

Congress does not have power to impose on the Courts a ministerial function to be performed on command of the Attorney General. It is fundamental law that a Federal Court can exercise judicial functions only, and a Statute which is interpreted to give the Court non-judicial functions is unconstitutional.

*United States* v. *Ferreira*, 13 How 40 and
*Keller* v. *Potomac Electric Company*, 261 U. S. 428.

The Interstate Commerce Act was among the first Statutes establishing a procedure whereby an Administrative

Agency was required to apply to the Court for enforcement of a subpoena, and the Court upheld the validity of the procedure in *I. C. C.* v. *Brimson*, 154 U. S. 447, because the function of the Court was to determine judicially whether grounds to warrant enforcement of the subpoena were distinctly set forth.

In dealing with the need for showing a proper basis upon which a Court is required to act, it was said in *McDonald* v. *United States*, 335 U. S. 451, 455-6:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. *It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.* The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." (Italics added.)

In the absence of any showing a) that a criminal proceeding was pending; b) that the desired testimony was material and important in such proceeding; and c) that there were adequate reasons for requiring the non-resident witness to return, the Court had no basis for the exercise of any judicial discretion and was without power or jurisdiction to make the orders in question.

## 5.

**The judgments of contempt were unauthorized and the fines were illegal.**

A. Disobedience of a void subpoena or a void order, issued by a court without jurisdiction, is not contempt.

When " * * * " a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void and the judgment for the contempt is equally void."

*Ex Parte Fisk*, 113 U. S. 713;
*Ex Parte Terry*, 128 U. S. 289;
*In re Ayers*, 123 U. S. 443.

Since the contempt here charged was not committed in the presence of the Court, Section 401, 18 U. S. C., expressly limits the power of the Court to punish for contempt to instances where there is "*disobedience or resistance to its lawful writ, process, order, rule, decree or command.*"

Essential to a valid conviction, is a showing a) that the subpoenas and the orders authorizing them were valid, and b) that the contempt proceeding itself was in accordance with established practice.

Here, the order to show cause of March 14, 1957 and its supporting affidavit which initiated, and formed the basis of the contempt proceeding, were never served upon the petitioners and they have not been furnished with any statement of "essential facts constituting the criminal contempt charged."

Without the service of such notice, the Court could not properly try or find the petitioners guilty.

B. The subpoenas issued to petitioners under the seal of the Court and the signature of the Clerk, pursuant to Judge McGohey's orders, contained the clear and explicit notice, with respect to a possible disregard or disobedience of its command: "*this you * * * are not to omit, under the penalty upon you * * * of Two Hundred and Fifty Dollars.*"

Thus, the maximum penalty specified for disobedience of the subpoena was clearly stated to be $250.00. Any penalty in excess of that amount is a denial of due process, illegal, cruel and excessive punishment and a deprivation of the petitioners' constitutional rights.

In the Court below, the Government attempted to evade the consequences of this official notice by claiming that a "card" purporting to give notice of the issuance of the subpoena and delivered with the subpoena contained the words "*Two Hundred and Fifty Dollars* and other penalty provided by law." But this card was not an official document, was not issued pursuant to any order, was not given under the seal of the Court, was not signed by the Clerk of the Court nor even by the Attorney General, and in any event gave no notice or warning of any money penalty in excess of $250.00. The primary purpose of this card was to advise the witness to appear for a preliminary interview at the office of the Assistant United States Attorney instead of the Grand Jury.

## CONCLUSION

**For the foregoing reasons it is respectfully prayed that the petition for a writ of certiorari be granted.**

PAUL O'DWYER,
*Attorney for Petitioners,*
40 Wall Street,
New York 5, New York.

# APPENDIX

## Decision Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 103—October Term, 1957.

Argued November 6, 1957. Decided December 5, 1957.

Docket No. 24685

—o—

In the Matter of

The issuance of a Subpoena to ALFRED K. STERN and MARTHA DODD STERN, citizens of the United States presently residing in Mexico,

*Appellants,*

*against*

UNITED STATES OF AMERICA,

*Appellee.*

—o—

Before:

SWAN, MEDINA and WATERMAN, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Richard H. Levet, Judge.

On petition of appellee to dismiss the appeal.

The appellants, Mr. and Mrs. Stern, appeal from orders finding them guilty of contempt in failing to obey grand jury subpoenas, and fining each $25,000. Service of the subpoenas and of the orders to show cause why they should not be punished for contempt was made in Mexico pursuant to 28 U. S. C. A. Section 1783, 1784. The appellants challenge the legality of such service. But before reaching the

merits of the appeal the appellee's motion to dismiss must be considered.

PAUL W. WILLIAMS, U. S. Attorney, ROBERT KIRTLAND, and HERBERT C. KANTOR, Assistant U. S. Attorneys, of Counsel, for appellee-movant.

PAUL O'DWYER, Attorney for appellants, in opposition.

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PER CURIAM:

The motion is based upon the affidavit of an Assistant United States Attorney, made on information and belief. The affidavit sets out the following facts: On February 22, 1957, subpoenas were issued, pursuant to orders of a Judge of the District Court for the Southern District of New York, commanding the Sterns to appear before a federal grand jury on March 14, 1957, in the United States Court House in New York City. The subpoenas were personally served upon them in Mexico City on February 27, 1957, by an American Consul. Appearing specially by their attorney, the Sterns moved on March 7, 1957, to quash the subpoenas. After argument their motions were denied on March 12. On the following day the Sterns petitioned this court for a writ of prohibition or mandamus directing the District Judge to vacate the subpoenas and to issue a stay pending disposition of the petition. This court denied the stay on March 14, 1957, and on April 16, 1957, denied "Per Curiam" the petition.

The grand jury convened on March 14, 1957, but the Sterns did not appear. On the same day Judge Murphy ordered them to show cause on March 26, 1957, why they should not be punished for contempt for failure to obey the subpoenas, and further ordered the Marshal to seize property of the Sterns, not to exceed $100,000 each, within the United States to be held to satisfy any judgment

arising out of these proceedings. The order also directed that a copy thereof be served upon the Sterns at least seven days before March 26, 1957. They filed notice of appeal from this order on March 22, 1957.

As the American Consul in Mexico City had been unable to serve a copy of the show cause order of March 14, 1957, Judge Murphy amended the return date to April 15, 1957, and the time for service to seven days prior thereto. This amended order was personally served on the Sterns by an American Consul on April 1, 1957. Upon their application the contempt hearing was adjourned from April 15, to April 25, 1957. On that date the hearing was held before Judge Levet and decision reserved. On May 1, 1957, he denied the motion to set aside the show cause order of March 14, 1957, and refused to expunge that portion of the order which directed the Marshal to seize property. On May 6, 1957, Judge Levet held the Sterns in contempt of the District Court and fined them $25,000 each. Notices of appeal from this judgment were filed May 10, 1957.

The moving affidavit alleges that during the period from February 28, 1957, to April 24, 1957, the Sterns liquidated assets in the United States worth more than $500,000, and that their purpose in liquidating their assets was to frustrate the court's power to collect the fines. The government has been unable to find any property of the Sterns in the United States, and the fines remain unpaid, although the District Court did not authorize any stay in the execution of its order. Nor did the appellants post any bond pursuant to Rule 38(a)(3) F. R. Cr. P. to guarantee payment of the fines.

On July 20, 1957, the appellants fled from the Republic of Mexico to Czechoslovakia. They made this trip on Paraguayan passports and purported to be naturalized citizens of Paraguay. It is alleged that their purpose was to remove themselves further from the reach of the judicial power of the United States.

# In the Supreme Court of the United States

OCTOBER TERM, 1957

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No. 977

ALFRED K. STERN AND MARTHA DODD STERN,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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On February 21, 1957, pursuant to orders of the United States District Court for the Southern District of New York (R. 4, 7), in response to the application of counsel for the Government (R. 5–7), subpoenas (R. 7–8) were issued under the authority of 28 U. S. C. 1783,[1] commanding petitioners, a hus-

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[1] This section provides in pertinent part:

"§ 1783. *Subpoena of witness in foreign country.*

"(a) A court of the United States may subpoena, for appearance before it, a citizen or resident of the United States who:

* * * * *

"(2) is beyond the jurisdiction of the United States and whose testimony in a criminal proceeding is desired by the Attorney General.

"(b) The subpoena shall designate the time and place for appearance before such court of the United States, and shall

band and wife who were at that time citizens of the United States residing in Mexico, to appear before the federal grand jury for that District on March 14, 1957, and to give evidence in connection with an alleged violation of 18 U. S. C. 371 (the general conspiracy statute). The orders authorizing the issuance of the subpoenas directed that they be served by any American consul in Mexico and that each petitioner was to be tendered, at the time of such service, travel and attendance expenses in the amount of $468 (R. 4; see R. 6). On February 27, 1957, the subpoenas were personally served on petitioners by the American Consul in Mexico City, who tendered each the sum of $468, which each accepted (R. 17).

On March 7, 1957, petitioners, appearing specially by counsel, moved to quash the subpoenas and to set aside the orders for their issuance (R. 9, 34). Following oral argument on March 11th, the motions were, on March 12, 1957, denied (R. 10, 18).[2]

On March 14, 1957, neither petitioner appeared before the grand jury as required by the terms of their respective subpoenas (R. 18). On the same date, both were ordered to show cause, on March 26, 1957, why they should not be punished for contempt for their

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issue to any United States consul in such foreign country. The consul shall make personal service of the subpoena and any order to show cause, rule, judgment or decree on the request of the court of the United States or its marshal, and shall make return thereof to such court after tendering to the witness his necessary travel and attendance expenses, which shall be determined by such court and sent with the subpoena."

[2] Petitioners thereafter sought, without success, to challenge the orders of denial in the Court of Appeals through writs of mandamus and prohibition (R. 18, 34).

failure to obey the subpoenas (R. 10–11). The order of the court, service of which was required to be made on petitioners at least seven days prior to the return date (R. 12), further directed that the United States Marshal seize property in the United States belonging to petitioners, in amounts not to exceed $100,000 each, to be held to satisfy any judgment arising out of the proceedings (R. 34–35).[3]

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[3] See 28 U. S. C. 1784, which provides in pertinent part as follows:

"§ 1784. *Contempt.*

"(a) A court of the United States which has issued a subpoena served personaliy in a foreign country may order the witness who has failed to appear as directed therein to show cause before it at a designated time why he should not be punished for contempt.

"(b) If security is given for any damage which the witness might suffer should the charge be dismissed, the court may direct, as a part of such order, that any property of the witness within the United States be levied upon or seized, in the manner provided by law or court rules governing levy or seizure under execution, and held to satisfy any judgment that may be rendered against the witness. The security required by this subsection shall not be required of the United States.

* * * * *

"(d) On the return day of such order or any later day to which the hearing may be continued, proof shall be taken. If the charge of recusancy against the witness is sustained, the court may adjudge him guilty of contempt and, notwithstanding any limitation upon the power of the court generally to punish for contempt, may fine him not more than $100,000 and direct that the fine and costs of the proceeding be satisfied unless paid by a sale of the property levied upon or seized, such sale to be conducted upon the notice required and in the manner provided for sales upon execution. Any such judgment rendered upon service by publication only may be opened for answer within one year."

On March 21, 1957, upon the advice of the American Consul in Mexico City that he had been unable to make service of the foregoing order of March 14th within the time required by its terms (R. 12–13, 28–30), the order was amended so as to make the return date April 15, 1957, and the service date not less than seven days prior to that date (R. 10–11, 27–28, 35). On April 1, 1957, petitioners were personally served with this amended order (R. 19, 26, 35).

On April 15, 1957, counsel for petitioners appeared specially for petitioners and moved that the proceedings be adjourned to April 25, 1957; the motion was granted (R. 19, 35). On the latter date, counsel for petitioners, again entering a special appearance on petitioners' behalf, moved to dismiss or annul the contempt proceedings and to set aside the order of March 14th, *supra*, directing the United States Marshal to seize property in the United States belonging to petitioners (R. 14–15, 19–20). On May 1, 1957, the District Court (Levet, D. J.) entered an order (R. 15) and opinion (R. 16–21) denying this motion.

On May 6, 1957, pursuant to 28 U. S. C. 1784 (see fn. 3, *supra*, p. 3), petitioners were adjudged in contempt of court, and each was sentenced to pay a fine of $25,000, "to be satisfied, unless paid, pursuant to" the provisions of that section (R. 22–23).

On appeal by petitioners from this judgment to the Court of Appeals for the Second Circuit, the Government, in addition to briefing and arguing the merits of the case, moved to dismiss the appeals (R. 31) for the reasons stated in an accompanying affidavit of

counsel (R. 32–37). In this affidavit, Government counsel (Assistant United States Attorney Kantor), after summarizing the proceedings as hereinabove set forth (R. 33–35), alleged that, "[a]fter the issuance of the order of March 14, 1957, authorizing the seizure of property [see *supra*, p. 3], the Government found that, although the [petitioners] had owned more than a million dollars worth of securities in American corporations during the year 1956, these securities and other assets had been liquidated before seizure could be effected by the Government"; that, "[d]uring the period from February 28, 1957, to April 24, 1957 alone, the [petitioners] liquidated assets worth over half a million dollars"; that "[t]he purpose of the [petitioners] in liquidating these assets was to frustrate the exercise of the judicial power of the United States"; that "[t]he Government has to date been unable to find any property of the [petitioners] in the United States, and the fines remain unpaid, although the District Court did not authorize any stay in the execution of its order"; that petitioners had not "post[ed] any bond pursuant to Federal Rule of Criminal Procedure 38 (a) (3)[1] to guarantee payment of the fines"; and that on July 20, 1957, peti-

[1] Rule 38 (a) (3) provides:

"A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets."

tioners, traveling on Paraguayan passports and purporting to be naturalized citizens of Paraguay, had, for "[t]he purpose of * * * remov[ing] themselves further from the reach of the judicial power of the United States," "fled from the Republic of Mexico * * * to Russian dominated Czechoslovakia" (R. 35–36).[5] "The conduct of the [petitioners] in liquidating their American assets, abandoning their citizenship, and fleeing behind the Iron Curtain," it was contended, "has shown that they have no intention of complying with the mandate of this Court should it affirm the judgment below" (R. 37). Accordingly, it was urged, the Court of Appeals "should not lend its power to the decision of an appeal so blatantly abandoned by the [petitioners]" (*ibid.*).

An affidavit in opposition to the foregoing motion to dismiss (R. 38–40) was filed by counsel for petitioners, appearing specially on their behalf, but, as noted by the Court of Appeals, this affidavit denied none of the facts alleged in the affidavit of Government counsel, said "not a word about [petitioners'] liquidating their assets," and did not "[suggest] that they have any assets remaining in the United States", (R. 44; Pet. App. 32).

On December 5, 1957, the Court of Appeals, in a *per curiam* opinion (R. 41–44, Pet. App. 29–32, reported at 249 F. 2d 720), directed the clerk to "enter an order dismissing the appeal unless within 60 days

[5] The affidavit further stated that petitioners, on September 9, 1957, had been indicted in the Southern District of New York for conspiracy to commit espionage against the United States (R. 36).

from the date of this opinion the [petitioners] shall deposit the amount of their fines and costs in the registry of the district court or give bond for the payment thereof" (R. 44; Pet. App. 32). "Upon the record before us," said the court in explaining its decision, "the conduct of the [petitioners] in liquidating their American assets, abandoning their United States citizenship and going to Czechoslovakia, shows a determined effort to deprive the court of power to execute its mandate if the judgment on appeal should be affirmed. Here we have an undisputed, studied, and successful attempt to render the court powerless to enforce its decree. We see no valid distinction between this case and that of Eisler v. United States, 338 U. S. 189, dismissed 883" (*ibid.*).

On February 5, 1958, petitioners having failed to comply with the conditions set forth in the Court of Appeals' opinion, *supra* (R. 47), their appeals were dismissed (R. 48). The petition for a writ of certiorari seeks review of this judgment.

1. There lies at the threshold a question as to the petition's timeliness.

The judgment of the Court of Appeals, dismissing the appeals, was entered on February 5, 1958 (R. 48). If this was a judgment "in a criminal case" (as we think it plainly was—see *infra*), petitioners had under the Rules of this Court (Rule 22 (2)) thirty days from that date, plus an additional thirty days if authorized by a Justice of the Court, or until April 7, 1958, within which to file a petition for certiorari. The petition was not filed until May 5, 1958.

treated as a civil appeal, and that the procedures for civil appeals apply to the time limitations.

In that case, this Court construed the Act of March 8, 1934 (former 28 U. S. C. 723a) which, in so far as relevant, was substantially identical with present 18 U. S. C. 3772 saying:

> "We come then to the question of the jurisdiction of the Circuit Court of Appeals. We disagree with the Government in its contention that the appeal in this case was governed by the Criminal Appeals Rules. Those rules were promulgated pursuant to the provisions of the Act of March 8, 1934 (48 Stat. 399; 28 U. S. C. 723a) which provided, *inter alia*, that this Court should have 'the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the Court if a jury has been waived, or plea of guilty, in criminal cases'. The rules were adopted 'as the Rules of Practice and Procedure in all proceedings after plea of guilty, verdict of guilty by a jury is waived, in criminal cases'. 292 U. S. 661. In this case there was no plea of guilty, there was no verdict of guilt by a jury, and there was no finding of guilt by the Court where a jury was waived. To be sure, the rules and the Act are applicable 'in criminal cases'. But we do not agree with the government that the qualifying language of the rules designates merely the stage of the proceedings 'in criminal cases' where the rules become applicable. It is our view that the rules describe the kinds of cases to which they are to be applied. The Act of March 8, 1934 amended the Act of February 24, 1933 (47 Stat. 904) which gave this Court rule-making power 'with respect to any or all proceedings after verdict in criminal cases'. The legislative history makes it abundantly clear that the amendment in 1934 so far as material here, was made because 'it would not seem to be desirable that there should be different times and manner of procedure in cases of appeal where there is a verdict of a jury as distinguished from cases in which there is a finding of guilt by the Court on the waiver of a jury.'"

The Government opposes the petition in reliance upon a strained interpretation of Rule 54(b)(5) which excludes the application of Rule 38(a)(3) to * * * "proceedings against a witness in a foreign country under Title 28 U. S. C. 1784".

Incidentally and in any event Rule 38(a)(3) entitled "Stay of Execution and Relief Pending Review" confers no power to dismiss an appeal, but only to impose conditions in such instances where an application is made for a stay of execution pending review.

**It is respectfully submitted the petition for a Writ of Certiorari should be granted.**

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FILED
MAY 29 1958
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No. 977

# In the Supreme Court of the United States

OCTOBER TERM, 1957

ALFRED K. STERN AND MARTHA DODD STERN,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
*Solicitor General,*
J. WALTER YEAGLEY,
*Acting Assistant Attorney General,*
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further demonstrate that such is its underlying objective.

The Court of Appeals' order of December 5, 1957, *supra*, directing the dismissal of petitioners' appeals unless petitioners, within 60 days, deposited the amount of their fines in the registry of the District Court or gave bond for the payment thereof, was nothing more than a concrete application of Rule 38 (a) (3) to the facts and circumstances presented by this record.[7] Here, it was obviously too late to "re-

[7] Rule 54 (b) (5) provides that "[t]hese rules," i. e., the Federal Rules of Criminal Procedure, "do not apply to," *inter alia*, "proceedings against a witness in a foreign country under Title 28, U. S. C., 1784." The latter section (see fn. 3, *supra*, p. 3) contains the "contempt" provisions applicable to a refusal to obey a subpoena issued by a court of the United States which has been personally served in a foreign country on a citizen or resident of the United States. Petitioners argued in the Court of Appeals (see R. 40) that, by virtue of Rule 54 (b) (5), Rule 38 (a) (3) has no applicability to a fine imposed under 28 U. S. C. 1784. The argument—which is not renewed in this Court—is in any event clearly unsound. The evident meaning of the provision, *supra*, of Rule 54 (b) (5)—to the effect that the Federal Rules of Criminal Procedure "do not apply to" "*proceedings* against a witness in a foreign country under Title 28, U. S. C., 1784" (emphasis supplied)—is that the procedure for punishing contempts consisting of refusals to obey subpoenas served in a foreign country is as set forth in that Code section, rather than as provided in the "Criminal Contempt" provisions (i. e., Rule 42) of the Federal Rules of Criminal Procedure. Rule 38 (a) (3)—authorizing the requiring of the deposit of the amount of a fine in the registry of the district court pending appeal therefrom—is, on the other hand (like the rest of Rule 38), a rule of general applicability: that is, it applies to *any* fine. Consequently, the fact that the fines here in issue happened to arise out of proceedings for criminal contempt under 28 U. S. C. 1784 is an irrelevancy so far as the applicability of Rule 38 (a) (3) to those fines is concerned. Accordingly, Rule 54 (b) (5) is likewise irrelevant.

strain the defendant[s] from dissipating [their] assets," since this result (so far as the possibility of levying on the assets for the purpose of applying them or their proceeds towards the payment of the fines in issue was concerned) had already been accomplished by petitioners. The Court of Appeals' only recourse was thus to condition its consideration of the appeals on petitioners' depositing the amounts of their fines in the registry of the District Court, or giving bond for their payment, within a reasonable time to be fixed by an order. This is precisely what the Court of Appeals did. The sixty-day period fixed by the court's order was clearly reasonable, and petitioners do not suggest otherwise. When petitioners failed to meet this reasonable condition, they evidenced a basic absence of good faith in the prosecution of their appeals; that is to say, they evidenced an intent not to pay their fines regardless of the outcome of their appeals. They ought, in other words, to insure themselves against ultimate loss irrespective of what substantive disposition the Court of Appeals might make of their appeals. The Federal Rules of Criminal Procedure give no defendant this option. The dismissal of petitioners' appeals was accordingly proper. Cf. *Eisler* v. *United States*, 338 U. S. 189, 883, and *National Union* v. *Arnold*, 348 U. S. 37.

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
*Solicitor General.*
J. WALTER YEAGLEY,
*Acting Assistant Attorney General.*
PHILIP R. MONAHAN,
CARL G. COBEN,
*Attorneys.*

JUNE 1958.

It is true that an order of Mr. Justice Harlan, entered February 28, 1958, provided for an extension of petitioners' time for filing to May 5, 1958, but the order was entered pursuant to the representation of counsel that "[t]his is a civil appeal."* Such a characterization of the case, in our view, is patently erroneous. Petitioners were found guilty of criminal—not civil—contempt. The fines imposed were unconditional, and the purpose of the proceedings was to punish petitioners for their disobedience of judicially issued subpoenas. See R. 3, 11, 18, 19, 22–23, 27–28, Pet. App. 29, 30; and cf. 28 U. S. C. 1784 (a) and (d)

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*Counsel's application stated (p. 5): "This is a civil appeal, within the meaning of Rule 81 (a) (3), F. R. C. P., which ordinarily would start the tolling of petitioners' time to file for a writ of certiorari as of February 5, 1958, and give them until May 5, 1958 to make such filing. However, it may possibly be argued that the ninety days period commenced on December 5, 1957 [the date of the Court of Appeals' order of conditional dismissal of the appeals—see *supra*, pp. 6–7], in which case it would expire March 5, 1958."

Petitioners' suggestion that under Rule 81 (a) (3) of the Federal Rules of Civil Procedure an appeal from a judgment of contempt under 28 U. S. C. 1784 is an appeal in a civil proceeding is based, we think it clear, on a misreading of that rule. In pertinent part, it provides: "* * * These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings." Here, however, not only were the subpoenas judicial in nature (as distinguished from administrative, see Advisory Committee's Note), but, what is more important, the appeal involved was from a final judgment of contempt, calculated to *punish* petitioners for their completed acts of disobedience. See also text immediately following.

(set forth in fn. 3, *supra*, p. 3), which is the statutory basis on which petitioners were "adjudge[d] * * * guilty of" and "punished for" their contempts. An unconditional fine and a purpose to punish are the typical indicia of a criminal contempt judgment. *United States* v. *United Mine Workers*, 330 U. S. 258, 302–305. And see *Blackmer* v. *United States*, 284 U. S. 421, 440 (involving the same type of proceeding and the same statute as are involved here), expressly recognizing that "the offense is a criminal one."

It follows, therefore, that the petition is out-of-time.

2. In any event, it is submitted that the judgment below is clearly correct, and that the petition for certiorari presents no question meriting review by this Court. Rule 38 (a) (3) of the Federal Rules of Criminal Procedure (set forth in fn. 4, *supra*, p. 5) authorizes a district court or court of appeals, in any criminal proceeding in which the defendant has been sentenced to pay a fine which the defendant elects to challenge on appeal, to "require the defendant pending appeal to deposit the whole or any part of the fine" in the registry of the court or "to give bond for the payment thereof." The evident purpose of the rule is to ensure that the fine, in the event the appeal should fail, will be paid—that, in other words, the defendant will abide the result of his appeal should it be adverse. The rule's concluding provisions, giving the court the power to require the defendant pending appeal to "submit to an examination of assets" and to make "any appropriate order to restrain the defendant from dissipating his assets,"